

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

<u>In the Matter of</u>	)	
	)	
AT&T Corp.	)	
	)	RM No. 10593
Petition for Rulemaking to Reform	)	
Regulation of Incumbent Local Exchange	)	
Carrier Rates For Interstate Special	)	
<u>Access Services</u>	)	

**COMMENTS OF SPRINT CORPORATION**

Sprint Corporation, on behalf of its incumbent local exchange (“ILEC”), competitive LEC (“CLEC”)/long distance, and wireless divisions, respectfully submits its Comments in response to the Public Notice<sup>1</sup> requesting comments on AT&T Corp.’s (“AT&T”) Petition for Rulemaking.<sup>2</sup>

**I. INTRODUCTION**

AT&T's Petition claims that the large ILECs, particularly the BOCs, retain market power in the provision of interstate special access services and are abusing that power with unjust and unreasonable rates. AT&T further argues that the Commission’s existing pricing flexibility rules are incapable of addressing this problem and, in fact, are actually exacerbating the problem. Accordingly, AT&T’s Petition asks the Commission to initiate a rulemaking to reform pricing flexibility regulation of price cap ILEC rates for

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<sup>1</sup> Public Notice, Wireline Competition Bureau Seeks Comment on AT&T’s Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, DA 02-2913, released October 29, 2002.

<sup>2</sup> AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM No. 10593, filed October 15, 2002 (“AT&T Petition”).

interstate special access services. AT&T also requests interim relief, pending completion of the rulemaking, that would (1) reduce all special access rates subject to Phase II pricing flexibility to levels that would produce an 11.25% rate of return; and (2) impose a moratorium on consideration of new pricing flexibility applications.

## **II. SPRINT AGREES THAT THE PRICING FLEXIBILITY SCHEME NEEDS REFORM AND SUPPORTS AT&T'S REQUEST FOR A RULEMAKING.**

Sprint supports AT&T's request for a rulemaking and agrees that reform of pricing flexibility regulation of interstate special access services is necessary. Sprint believes the main problems with the existing pricing flexibility rules are that the ILECs are granted pricing flexibility based on "collocation" triggers that ignore the tremendous market power maintained by the ILECs, and in particular the RBOCs, and ignore whether actual competition for the services in question exists. Because of these problems, the existing regulatory scheme fails to meet the Commission's objectives, as stated in the *Pricing Flexibility Order*:<sup>3</sup>

The pricing flexibility framework we adopt in this Order is designed to grant greater flexibility to price cap LECs as competition develops, while ensuring that: (1) price cap LECs do not use pricing flexibility to deter efficient entry or engage in exclusionary pricing behavior; and (2) price cap LECs do not increase rates to unreasonable levels for customers that lack competitive alternatives. In addition, these reforms will facilitate the removal of services from price cap regulation as competition develops in the marketplace... .

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<sup>3</sup> *In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers, Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, CC Docket No. 96-262, CC Docket No. 94-1, CCB/CPD File NO. 98-63, CC Docket No. 98-157, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 (1999) ("*Pricing Flexibility Order*") at para. 3.

AT&T argues persuasively that the BOCs maintain tremendous market power in the provision of interstate special access services.<sup>4</sup> Competition is sparse at best and, where it does exist, exists on a limited building-by-building, service-by-service basis. Sprint agrees and has commented upon the BOCs' tremendous market power in numerous Commission proceedings, including Sprint's October 1998 filing in this

*Pricing Flexibility Proceeding:*

In 1996, only nine cents of every special access dollar spent by Sprint went to non-ILEC vendors. By January 1998, this figure had increased only slightly: alternative vendors accounted for only 9.6% of Sprint's total access facility expenses.<sup>5</sup>

More recently, Sprint pointed out in the Commission's *Special Access Performance Measurement* proceeding: "Sprint Long Distance ..., continues to rely upon the ILECs for approximately 93% of its total special access needs despite aggressive attempt to self-supply and to switch to CLEC-provided facilities wherever feasible."<sup>6</sup>

Indeed, evidence to date demonstrates that competitors have not built and that in the vast majority of locations, there is simply no competition. As Sprint pointed out in the *UNE Triennial Review Proceeding*:

The small percentage of buildings that are in fact served by alternative sources of supply is evidence of the barriers and constraints to loop deployment discussed above. There are 744,000 commercial buildings alone in the U.S. Except for an insignificant number, all of those are reached by the incumbent LEC. Despite growth in alternative access

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<sup>4</sup> See generally, *AT&T's Petition* at pp. 27-28.

<sup>5</sup> Comments of Sprint Corporation, October 28, 1998, p. 5 in response to the October 5, 1998 Public Notice requesting the parties to refresh the record in *In the Matter of Access Reform*, CC Docket No. 96-262/

<sup>6</sup> See, Comments of Sprint Corporation filed January 22, 2002 in CC Docket No. 01-321 at p. 4. See also, Comments of Sprint Corporation in the *UNE Triennial Review Proceeding*, CC Docket No. 01-338, filed April 5, 2002 at pp. 23-24.

provider facilities over the last three years, AAVs reach only a tiny fraction of that number.<sup>7</sup>

Sprint updated its *UNE Triennial Review Proceeding* with an *ex parte* on October 16, 2002:

- Sprint reported [in its Comments] high capacity alternate access vendor (AAV) alternatives to 29,884 of the estimated 744,00 commercial buildings nationwide
- Two AAVs that provide high capacity building access have identified a subset of buildings they serve where they cannot serve the entire buildings.

Previous Count of Buildings Served by AAVs:	29,884
Current Count of Buildings with Service to Single Customer:	12,181
Current Count of Buildings Served by AAVs:	17,703

Sprint's experiences in attempting to cut its reliance on BOC Special Access does not appear to be an isolated instance, but rather typical of the industry experience as a whole. As AT&T's Petition notes:

AT&T's experience is confirmed by the findings of the state commissions that have undertaken investigations of special access services. As the New York PSC has found, Verizon's network serves 7354 buildings in LATA 132 (Manhattan) over fiber while CLECs serve fewer than 1000 buildings. Indeed, the New York PSC recently reaffirmed that "Verizon continues to be the dominant provider of high-capacity loops used to provide service to large volume customers," and that "[e]ven in lower/midtown Manhattan, Verizon facilities (retail and wholesale) still serve over half of all special service circuits. Similarly, the Massachusetts DTE recently held that strict rate regulation of Verizon's intra-LATA special access service was necessary to protect competition."<sup>8</sup>

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<sup>7</sup> Comments of Sprint Corporation, *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, filed April 5, 2002, at p. 23. The redacted version of those comments provides actual percentages of buildings reached by AAVs.

<sup>8</sup> AT&T's Petition at p. 28.

Compounding the problem is the pricing flexibility rules' use of collocation as a trigger for pricing flexibility, rather than actual competition. Experience has shown that collocation triggers are not a good indicator of the level of competition within a given MSA. The presence of several collocators in an MSA does not mean that IXC's or end users have a competitive alternative for the interstate special access services they need or that there is a competitive alternative throughout the MSA or even in the particular office where the collocators are present. In short, the experience to date with pricing flexibility is contrary to what the Commission believed it would be when the Commission adopted the pricing flexibility rules. There is very little correlation between the presence of collocators and the presence of alternative competitive services. Because of this, and because of the BOC's increased stranglehold on interstate special access services, pricing flexibility in its present form has failed to meet the Commission's objectives.

**A. The BOCs have used pricing flexibility to deter efficient entry and engage in exclusionary pricing behavior.**

The contracts offered by the BOCs cover a broad range of special access services over a broad geographic service area. The BOCs are the only providers that can offer that geographic and service scope. In an effort to get any discount on interstate special access services, the IXC's must sign up for these broad contracts. To meet the discount terms, the IXC's must leave most if not all of their services with the BOCs. The IXC's are thus obligated to the BOC services and cannot switch to a competitor, even in the unlikely event that one exists. With the large IXC's locked into the BOC, and competitors locked out, there is no economic reason for a competitor to attempt to build facilities that would provide a competitive alternative to the BOC.

AT&T described this problem succinctly: “[t]he Bells are using their market power to force carriers to enter into anticompetitive option pricing plans (“OPPs”) that remove even the possibility that market forces could constrain the Bells’ market power.”<sup>9</sup> Sprint has had the same experience with OPPs. The problem is that the BOCs’ pervasive market power combined with their ability to use contracts under Phase One pricing flexibility act as a deterrent to entry into facility-based competition.

**B. The BOCs have used pricing flexibility to increase rates to unreasonable levels for customers that lack competitive alternatives.**

As demonstrated above, there are few competitive alternatives, especially for last mile facilities. Additionally, through pricing flexibility and contracts, the BOCs have managed to deter competition and, if left unchecked, will only continue to do so. Thus, with their market power and with little competition to worry about, the BOCs have used pricing flexibility to increase rates.

Sprint demonstrated this point, at some length, in its UNE Triennial Review

Reply Comments:

Sprint’s own experience in price flex markets suggests that RBOCs have, and exploit, market power. In those MSAs where RBOCs received pricing flexibility relief, RBOCs have restructured their rates and fees. Rather than lower rates, the effect has been to increase fees that collocating competitors must pay. Sprint’s MAN network is being built in several markets in order to minimize Sprint’s transport expense paid to the RBOCs. It includes collocating at key central offices and the self-provisioning of transport between those end offices and Sprint’s POP. Sprint then purchases connections from these central offices to the customer premises. Soon after learning of Sprint’s competitive strategy for its MAN network, Verizon doubled its administrative fee per DS0 equivalent in specific locations where it expected to lose transport revenue to its competitor. ... If the market were truly competitive, Verizon would not have had the ability to unilaterally increase prices for fear of losing out to the competition. Additionally, Sprint compared the RBOC special

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<sup>9</sup> AT&T Petition at p. 22.

access rates before and after price flexibility was granted and determined that DS1 special access rates increased an average of 9.8% and DS3 rates increased an average of 5.6%. Basic economic theory suggests that prices cannot be unilaterally raised in a competitive market. Therefore, the fact that ILECs have the ability to raise rates whenever they qualify for pricing flexibility is a strong indicator that the market is not competitive.<sup>10</sup>

Finally, the fact that the BOCs can increase prices demonstrates that the Commission's pricing flexibility objective for the "removal of services from price cap regulation as competition develops in the marketplace"<sup>11</sup> has not occurred. Rather, services have been removed before competition develops and, as demonstrated above, the BOCs can then further use pricing flexibility to ensure that competition does not develop. Without serious reform, pricing flexibility will allow the BOCs to maintain and increase their stranglehold over interstate special access services.

### **III. SPRINT DOES NOT AGREE THAT AT&T'S REQUESTED INTERIM RELIEF IS APPROPRIATE OR WARRANTED.**

While Sprint agrees that the Commission's special access pricing flexibility rules need to be revised, it does not believe that AT&T's proposed remedies are appropriate, now or later. Any interim relief, prior to a rulemaking and opportunity for all parties to be heard and for the Commission to develop a complete record, would be premature and ill-advised. Additionally, the first prong of AT&T's requested relief -- reduce all special access rates subject to Phase II pricing flexibility to levels that would produce an 11.25% rate of return -- amounts to rate prescription which must be accomplished through the procedures in Section 205 of the Act (47 U.S.C. § 205) and not through "interim relief"

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<sup>10</sup> Reply Comments of Sprint Corporation, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, DD Docket No. 01-338, filed July 17, 2002 at pp. 24-5.

<sup>11</sup> See, footnote 3 *supra*.

pending further action on a request for rulemaking.<sup>12</sup> AT&T's proposal has a punitive cast which makes no sense given that the ILECs, including the BOCs, do not appear to have acted outside the rules as established by the Commission's Order, which was affirmed by the Court of Appeals.<sup>13</sup> Although Sprint shares AT&T's view that the current Order is flawed and that the current rules warrant reexamination, undertaking the "interim relief" sought by AT&T would be reversible error.

Rather, if the Commission conducts a rulemaking, which Sprint urges it to do, Sprint will suggest a more moderate approach that will bring pricing flexibility services back into price cap regulation and will grant ILECs pricing flexibility to respond to actual competitive bids. Sprint believes it is possible to design a system, without imposing onerous administrative burdens, which will better match pricing flexibility with actual competition and is prepared to work with the Commission and others in the industry to develop such a regime.

#### **IV. CONCLUSION.**

Sprint urges the Commission to grant AT&T's Petition in so far as it requests a rulemaking to reform the pricing flexibility rules for price cap ILEC provision of interstate special access services. The BOCs still maintain tremendous market power in these services and have combined that market power with pricing flexibility to further lock up the interstate special access market and to increase prices where competition does

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<sup>12</sup> American Telephone and Telegraph Company v. FCC, 487 F.2d 865, n.13 (2<sup>nd</sup> Cir. 1973) ("Section 205(a) authorizes the Commission, if it is of the opinion that any charge of any carrier is or will be in violation of the Act, "to determine and prescribe what will be the just and reasonable charge . . . ." Such determination may be made only "after full opportunity for hearing" upon a complaint or under an order made by the Commission on its own initiative.")

<sup>13</sup> WorldCom, Inc. v. FCC, 238 F. 3d 449 (D.C. Cir. 2001).



not exist. However, Sprint does not agree that the interim relief requested by AT&T should be granted. The Commission should design the appropriate relief following the rulemaking and development of a complete record.

Respectfully submitted,

SPRINT CORPORATION

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December 2, 2002